Supreme Court, U.S.
FILED

98 995 DEC 16 1998

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No.

In the
Supreme Court of the United States
October Term, 1998

HARRY ROBISHEAUX,
Petitioner

v.

MEMORIAL CITY REGIONAL MALL,
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

LINDA G. CRYER
2211 Norfolk, Suite 600
Houston, Texas 77098
(713) 621-5957
(713) 528-3415 Fax

Attorney for Petitioner

Alpha Law Brief company • Houston Texas • (713) 270-6604

23 pp

QUESTION PRESENTED

Does the State of Texas deprive a civil litigant of the constitutional right of adequate, effective and meaningful access to court when a mistake of the Secretary of State of Texas does not toll the statute of limitations and leaves the plaintiff without an adequate remedy at law.

PARTIES TO THE PROCEEDINGS

PETITIONER - PLAINTIFF - HARRY ROBISHEAUX

PETITIONER'S COUNSEL
LINDA G. CRYER
2211 Norfolk, Suite 600
Houston, Texas 77098
(713) 526-1171
(713) 528-3415 Fax

RESPONDENT - DEFENDANT -
MEMORIAL CITY REGIONAL MALL,
d/b/a METRO NATIONAL CORPORATION

DEFENDANT'S COUNSEL
CLAY STEELY
JENKENS & GILCHRIST
1100 Louisiana, Suite 1800
Houston, Texas 77002

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Plantiff Harry Robisheaux respectfully requests that a writ of certiorari be issued to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The Texas Supreme Court denied the petition for review.

The Court of Appeals for the First District of Texas issued its opinion on May 28, 1998, affirming the summary judgment of the 55th District Court of Harris County, Texas.

STATEMENT OF JURISDICTION

The judgment of the Texas Supreme Court was entered on September 17, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2 of the Constitution of the United States provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States".

Amendment I of the Constitution of the United States provides in relevant part: "Congress shall make no law respecting...the right of the people...to petition the Government for redress of grievances."

Amendment V of the Constitution of the United States provides in relevant part: "No person shall be...deprived of life, liberty or property without due process of law..."

Amendment XIV of the Constitution of the United States provides in relevant part: "...nor shall any State deprive any person of life, liberty, or property, without due process of laws..."

STATEMENT OF THE CASE

The fundamental question in this case is whether the State of Texas deprives civil litigants in Texas of the fundamental constitutional right of access to the courts where a mistake of the Secretary of State of Texas does not toll the statute of limitations and leaves the litigant without an adequate remedy at law.

On August 5, 1994, Petitioner fell to the pavement at Memorial City Mall sustaining serious injuries. On July 26, 1996, Petitioner filed his Original Petition against the Defendant, Memorial City Mall, incorrectly naming it Kirkland of Memorial City Mall as a result of incorrect information received from the office of the Secretary of State of Texas stating that the Memorial City Mall was doing business as Kirkland of Memorial City Mall and could be served through the registered agent of Kirkland of Memorial City Mall. On August 9, 1996, Kirkland of Memorial City Mall was served. On September 25 1996, Petitioner's counsel was informed that Kirkland of Memorial City Mall is a store located inside the Memorial City Mall, and not the proper defendant. On the same day, Petitioner then filed a First Amended Petition against the proper defendant, Memorial City Mall, naming Memorial City Regional Mall. On October 1, 1996, Memorial City Regional Mall was served and filed an original answer on October 21, 1996 stating that its correct name is Metro National Corporation.

On April 24, 1997, the trial court granted Respondent's Motion for Summary Judgment on the basis of limitations.

On June 4, 1997, the trial court denied Petitioner's Motion for New Trial.

Petitioner filed his Appellate brief on September 15, 1997. Petitioner informed the lower courts of the mistake of the Secretary of State in his appellate brief, and in his Petition for Review in which he argued that "it was a misapplication of the statute of limitations to hold that Petitioner's action is barred, and deprive a citizen of his right to a day in court...". Petitioner availed himself of each step of the appeal process to attempt to find a way into the courthouse of the State of Texas after the office of the Secretary of the State of Texas gave his attorney's assistant incorrect information regarding the registered name and registered agent of the party against whom he wished to file suit. This caused suit to be filed against the wrong defendant, and left Petitioner without access to the court after the statute of limitations had run, as the State of Texas does not allow a mistake of the Secretary of State of Texas to toll the statute of limitations.

PROCEEDINGS BELOW

The Court of Appeals of the First District of Texas affirmed the judgment of the district court on May 28, 1998.

Petitioner timely filed a Petition for Review in the Supreme Court of Texas which was denied on September 17, 1998.

REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE LOWER COURTS DEPRIVE CIVIL LITIGANTS OF THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS, WHICH CONFLICTS WITH THE PRIOR RULINGS OF THIS COURT.

The right of access to the courts is basic to our system of government, and it is well established today that it is one of fundamental right protected by the Constitution. In *Chambers v. Baltimore and Ohio Railroad*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed.143 (1907), the Supreme Court characterized this right of access in the following terms:

The right to sue and defend in the courts is the alternative to force. In an organized society it is the right conservative of all rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. 207 U.S. at 148, 28 S.Ct. at 35.

It is clear that the Court viewed the right of access to the courts as one of the privileges and immunities accorded to citizens under Article 4 of the Constitution and the Fourteenth Amendment. *Ryland v. Shapiro,* 708 F.2d 967 (CA 5 Tex. 1983)

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Supreme Court found in the first amendment a second constitutional basis for this right of access, indicating "The right of access to the courts is indeed but one aspect of the right of petition." *Id.* 92 S.Ct. @ 612.

A third constitutional basis for the right of access to the courts is found in the due process clause. *In Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)

The due process right of access has even been construed to allow prisoners meaningful access to the courts, which must be "adequate, effective and meaningful", *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

Under our Constitution, the right of access to the courts is guaranteed and protected from unlawful interference and deprivations by the state, and only compelling interests will justify such intrusions. *Ryland v. Shapiro, supra* @ 972.

The State of Texas, however, deprives its civil litigants of the fundamental right of access to the courts when the office of the Secretary of State gives incorrect information and the State refuses to toll the statute of limitations when a wrong defendant is sued, leaving the litigant without a remedy when suit is filed out of time against the correct defendant.

The Secretary of State of Texas is charged with the responsibility of being the office in which the State's corporations file their corporate name and registered agent. V.A.T.S. Bus. Corp. Act, art. 2.04 - 2.09. Attorneys and litigants are channeled into that office to ascertain the name and registered agent of those whom they wish to sue, without recourse to other sources of information.

When the Secretary of State gives incorrect information about the name of a party or its registered agent, however, which results in suit being filed against the wrong defendant, the statute of limitations is not tolled to allow the

litigant reasonable time to correct the mistake.

The use of "official mistake" to avoid the effect of a judgment has been applied to cover mistakes made by officers of the court or official court functionaries. *Matthew's Trucking v. Smith*, 682 S.W.2d 237 (Tex. 1984), citing *Baker v. Goldsmith*, 582 S.W. 2d 404, 407 (Tex. 1979); *Petro Chemical Transport, Inc. v. Carroll*, 544 S.W.2d 240 (Tex.1974).

The Secretary of State, however, is not an officer of the court or an official court functionary, and the Supreme Court of Texas has held that the "official mistake" rule would not be extended to that office. *Matthew's Trucking, supra* @ 239.

In the instant case, Petitioner received incorrect information from the office of the Secretary of State which caused him the file suit against the wrong defendant. Immediately upon being informed of the error, and less than sixty days after the statute of limitations had run, Petitioner filed an amended petition against the proper defendant. Despite the mistake of the office of the Secretary of the State, the respondent here was granted summary judgment on the basis of limitations, because the Secretary of State's error would not toll the statute of limitations.

Aware of the earlier ruling of the Texas Supreme Court regarding "official mistake", Petitioner focused his appellate arguments on the rule that in cases of misidentification where there is a genuine of issue of material fact as to whether the proper defendant was cognizant of the facts, was not prejudiced or placed at a disadvantage in obtaining relevant evidence to defend a suit, and had a business relationship with the misidentified defendant, then the statute of limitations would not operate to bar plaintiff's

suit. *Continental Southern Lines v. Hilland,* 528 S.W.2d 828, 831 (Tex.1975); *Matthew's Trucking v. Smith,* 682 S.W.2d 237 (Tex.1984).

Petitioner argued that given the facts in his case, which included the mistake of the Secretary of State; the fact that the correct defendant was cognizant of the facts, had a business relationship with the misidentified defendant, was not prejudiced or placed at a disadvantage in obtaining relevant evidence, and considering his diligence in filing suit against the correct defendant immediately upon being informed of the Secretary of State's error, it was a misapplication of the statute of limitations to bar his suit, and to deprive him of access to the court.

CONCLUSION

This case presents a question of exceptional importance, whether the State of Texas deprives its civil litigants of one of the "highest and most essential rights of citizenship", the right of access to the courts, when, after a state official makes an error, it fails to toll the statute of limitations for a reasonable time so that the litigant can correct the mistake for which the state is at fault, with diligence of the type exhibited by this Petitioner.

Respectfully submitted,

LINDA G. CRYER
2211 Norfolk, Suite 600
Houston, Texas 77098
(713) 621-5957
(713) 528-3415 Fax
TBN 05197500
Attorney for Petitioner

APPENDIX A

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

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SEP 17 1998

September 17, 1998

Ms. Linda G. Cryer
2211 Norfolk, Suite 600
Houston, TX 77098

Mr. Clay M. Steely
Jenkens & Gilchrist
1110 Louisiana, Suite 1800
Houston, TX 77002

RE: Case Number 98-0663
Court of Appeals Number: 01-97-00889-CV
Trial Court Number: 9637141

Style: HARRY ROBISHEAUX
v.
MEMORIAL CITY REGIONAL MALL

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review, as supplemented, in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Michael H. Kopp, Deputy
Michael H. Kopp, Deputy

cc: Ms. Stephanie Lavake, Clerk
Mr. Charles Barcarisse

APPENDIX B

Court of Appeals
First District of Texas

JUDGMENT

HARRY ROBISHEAUX, APPELLANT	Appeal from the 55th District Court of Harris County, Texas. (Tr.Ct.No. 963714). Panel consists of Justices Cohen, Taft, and Nuchia.
NO. 01-97-00889-CV	
V.	
MEMORIAL CITY REGIONAL MALL, APPELLEE	Opinion delivered by Justice Cohen.

The cause heard today by the Court is an appeal from the judgment signed by the court below on April 24, 1997. After submitting the cause and inspecting the record of the court below, it is the opinion of this Court that there was no reversible error in the judgment. It is therefore **CONSIDERED**, **ADJUDGED**, and **ORDERED** that the judgment of the court below be in all things **affirmed**.

It is further **ORDERED** that appellant, **HARRY ROBISHEAUX**, pay all costs incurred by reason of this appeal. It is further **ORDERED** that the appellant's surety, **UNIVERSAL SURETY OF AMERICA**, is jointly and severally liable for the payment of the costs incurred by reason of this appeal to the extent of the surety's liability on its bond.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Cohen, Taft, and Nuchia.

Judgment rendered May 28, 1998

APPENDIX C

Opinion issued May 28, 1998

In The
Court of Appeals
For the
First District of Texas

NO. 01-97-00889-CV

HARRY ROBISHEAUX, Appellant
V.
MEMORIAL CITY REGIONAL MALL, Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 9637141

OPINION

Harry Robisheaux sued "Memorial City Regional Mall" for injuries received in a fall. "Memorial City Regional Mall" is an assumed name of Metro National Corporation.[1] Metro National Corporation was granted summary judgment based on limitations. We affirm.

Facts

On August 5, 1994, Robisheaux fell at the entrance to Memorial City Regional Mall. This was a common area,

---

[1] The misnomer of Metro National Corporation as "Memorial City Regional Mall" is not at issue in this case.

not space leased to any tenant. On July 26, 1996, Robisheaux sued "Kirkland of Memorial City Mall," which apparently was a tenant at the mall. Robisheaux, however, had intended to sue the mall's owner, not any tenant.[2] On September 25, 1996, Robisheaux discovered the error and amended his petition, naming and soon serving "Memorial City Regional Mall" as the only defendant. In response to the service of that citation, Metro National Corporation filed an answer, saying it was doing business as "Memorial City Regional Mall."

Analysis

Robisheaux asserts the trial judge erred in granting Metro National Corporation's motion for summary judgment based on limitations and overruling his motion for new trial. We follow the usual standard of review. TEX. R. CIV. P. 166a(c); *Randall's Food Mkts. Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). A defendant seeking summary judgment based on limitations must conclusively prove that affirmative defense. *Veliscol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997).

Misnomer

In his third point of error, Robisheaux asserts the statute of limitations was tolled because there was a misnomer. A misnomer occurs when a plaintiff sues the right defendant, but calls it by the wrong name. *Enserch*

---

[2] Robisheaux's attorney asserts that her assistant was told by the Secretary of State's Office that "Kirkland of Memorial City Mall" was the appropriate party to sue. A mistake by the Secretary of State that causes a plaintiff to sue the wrong corporate defendant, however, is not grounds for tolling the statute of limitations. *Matthews Trucking Co. v. Smith*, 682 S.W.2d 237, 239 (Tex. 1985).

Corp. v. Parker, 794 S.W.2d 2, 4-5 (Tex. 1990). A misnomer tolls the statute of limitations, permitting a subsequent amended petition to relate back to the date of the original petition. [3] *Id.* If, however, the plaintiff sues and serves the wrong defendant, that is a misidentification. *Id.* at 5. In that case, limitations generally is not tolled. *Id.*

Here, Robisheaux sued the wrong defendant, "Kirkland of Memorial City Mall," within the limitations period, but did not sue the right defendant, "Memorial City Regional Mall," until limitations expired. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 1998) (two-year statute of limitations). "Kirkland of Memorial City Mall" is a separate entity from "Memorial City Regional Mall" and from Metro National Corporation. Thus, Robisheaux misidentified his defendant rather than misnaming it. Consequently, limitations was not tolled.

We overrule the **third** point of error.

Misidentification

Though misidentification generally does not toll the running of limitations, an exception exists if a "sufficiently intertwined" business relationship existed between the defendant that was timely sued and the defendant asserting limitations. *Enserch*, 794 S.W.2d at 5; *Hernandez v. Furr's Supermarkets, Inc.*, 924 S.W.2d 193, 196 (Tex. App.—El Paso 1996, writ denied) (in misidentification case, business relationship required to equitably toll limitations); *Cummings v. HCA Servs., Inc.*, 799 S.W.2d 403, 406 (Tex. App. —

---

[3] For example, Robisheaux's misnomer of Metro National Corporation as "Memorial City Regional Mall" would have tolled the statute of limitations if the suit against "Memorial City Regional Mall" had been timely filed and served.

Houston [4th Dist.] 1990, no writ) (same). Limitations is then equitably tolled if the defendant knew the facts of the accident, was not misled about the lawsuit, and was not prejudiced in obtaining evidence to defend the lawsuit. *Continental S. Line, Inc. v. Hilland*, 528 S.W.2d 828, 831 (Tex. 1975). In his first and second points of error, Robisheaux asserts there was a fact issue as to whether this exception applied.

Robisheaux asserts that the business relation between "Kirkland of Memorial City Mall" and Metro National Corporation was sufficient. We disagree. The business relationship must be "so intertwined that suit against the first corporation gave the second corporation notice of, and a reasonable opportunity to defend the case." *See Enserch*, 794 S.W.2d at 5. Here, "Kirkland of Memorial City Mall," whatever its character, was a separate entity from Metro National Corporation and from its assumed name, "Memorial City Regional Mall." They are not intertwined. Their only relationship was a landlord and tenant. Thus, limitations was not equitable tolled.[4]

---

[4] Robisheaux asserts that his claim letter sent to "Memorial City Shopping Center Management Office" gave Metro National Corporation timely notice of his claims. Because Robisheaux did not establish a sufficiently intertwined business relationship, we do not reach that issue.

Robisheaux also asserts that evidence presented in his motion for new trial created a fact issue. We will not consider this evidence because it was not before the judge when she rendered summary judgment. TEX. R. CIV. P. 166a(c); *Rodriguez v. Spencer*, 902 S.W.2d 37, 45 (Tex. App. — Houston [1st Dist.] 1995, no writ). Robisheaux contends he did not have the evidence before the summary judgment hearing because appellee did not timely answer his discovery. If so, the remedy was to take action before the summary judgment was granted by filing a motion to compel or a motion for continuance.

We overrule the **second** and **third** points of error.

We affirm the judgment.

Murry B. Cohen
Justice

Panel consists of Justices Cohen, Taft, and Nuchia.

Do not publish. TEX. R. APP.P. 47.

APPENDIX D

NO. 96-37141

HARRY ROBISHEAUX	§	IN THE DISTRICT
	§	COURT OF HARRIS
VS.	§	COUNTY, TEXAS
	§	55TH JUDICIAL
KIRKLAND OF	§	DISTRICT
MEMORIAL CITY MALL	§	

ORDER

BE IT REMEMBERED that on this day came on to be considered Defendant Metro National Corporation's Motion for Summary Judgment. The Court, after having considered the pleadings, the Motion for Summary Judgment, and the arguments of counsel, is of the opinion and finds that there is no genuine issue of material fact that Plaintiff Harry Robisheaux filed his claims and causes of action against Defendant Metro National Corporation outside of the applicable statute of limitations. Defendant Metro National Corporation's Motion for Summary Judgment based on the applicable statute of limitations is hereby **GRANTED**. It is, therefore

ORDERED, ADJUDGED AND DECREED that Plaintiff Harry Robisheaux's claims and causes of action against Defendant Metro National Corporation be and are hereby dismissed with prejudice, a Final Judgment will be entered reflecting the same, and that all costs of Court are taxed against the party incurring the same.

All relief not expressly granted herein is **DENIED**.

SIGNED on this the ____ day of _____, 1997.

JUDGE PRESIDING

CMS\262192

APPROVED AS TO FORM AND CONTENT:

HAYS, McCONN, RICE & PICKERING

By /s/ Clay M. Steely

CLAY M. STEELY
State Bar No. 00791725
400 Two Allen Center
1200 Smith Street
Houston, Texas 77002
Telephone: 713/654-1111
Facsimile: 713/655-9212

Attorneys for Defendant,
METRO NATIONAL CORPORATION